APPEAL NO. 021472
FILED JULY 30, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on May 2, 2002. The hearing officer determined that the respondent's (claimant) compensable (right knee) injury of _____, extends to and includes the right knee condition subsequent to _____; that the claimant had disability from _____, through March 31, 2002; and that the claimant had not reached maximum medical improvement (MMI) as of January 14, 2002, as assessed by the designated doctor.

The appellant (carrier) appealed, contending that the claimant continued to be self-employed "during the same hours he would have been working for Employer"; that the claimant sustained a new injury rather than a "follow on" injury on _____; and that the claimant was at MMI on September 12, 2001. The claimant responds, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The claimant was employed as a used car salesman by the employer dealership. It is undisputed that the claimant sustained a compensable right knee injury on _____; that the claimant had right knee surgery on February 7, 2001; and that the claimant was certified by the carrier's required medical examination (RME) doctor as having reached MMI on September 12, 2001, with a 6% impairment rating. The claimant, at some time, had been released to return to work with a recommendation that he use a golf cart to ride around the employer's lot. No golf cart was provided and the claimant never returned to work as a car salesman for the employer. It is also undisputed that both before and after his injury the claimant had concurrent self-employment buying and selling vehicles and also buying, fixing up, and selling or leasing real estate. On _____, the claimant was on the premises of one of his properties when he said he "stepped off and tripped . . . and it twisted my [right] knee . . . ." The claimant had apparently disputed the RME doctor's assessment and a Texas Workers' Compensation Commission-selected designated doctor, in a report dated January 14, 2002, stated that the claimant was not at MMI.

Regarding the extent-of-injury issue the question whether the claimant sustained a new injury or whether the _____ compensable injury extended to or was a producing cause of the claimant's current "right knee condition subsequent to _____," is a factual determination for the hearing officer, as the sole judge of the weight and credibility of the evidence, to resolve. He did so in the claimant's favor, and that determination is supported by sufficient evidence. The hearing officer's decision on extent of injury is affirmed.

Likewise, the hearing officer's adoption of the designated doctor's report is affirmed. The designated doctor's report has presumptive weight and the only medical evidence to the contrary is the RME doctor's report, which the hearing officer found did not constitute the great weight of other medical evidence contrary to the designated doctor's opinion.

Disability is defined as the inability because of a compensable injury to obtain and retain employment at the preinjury wage. Although the claimant's treating doctor took the claimant off work, it is undisputed that the claimant continued to work in his concurrent self-employment during the period in question (_____, to March 31, 2002). The only information regarding the claimant's preinjury wage was a note by the benefit review officer in an interloctory order reciting a $759.00 average weekly wage (AWW). The claimant's testimony, and answers to interrogatories, indicated that the claimant's "estimate [of] total gross earnings from all sources to be approximately $60,000 in 2000 and $35,000 in 2001." (Emphasis supplied.) The claimant clarified that the 2001 figure was "probably close to around 40" (meaning $40,000. a year), which included workers' compensation benefits (apparently both temporary income benefits and impairment income benefits). There was no evidence, one way or the other, that the claimant's earnings or time spent at his concurrent self-employment had increased, decreased or stayed the same after his injury, and there was absolutely no evidence or testimony regarding the claimant's earnings during the 14 or so weeks at issue. The hearing officer apparently ended disability on March 31, 2002, after viewing a videotape of the claimant's activities taken on April 1, 2002.

We disagree with the carrier's contention that the hearing officer found "that the Claimant's self-employment was not concurrent employment" and that since the claimant was, postinjury, working at his self-employment the same general hours of his employment with the employer, that would show that the claimant did not have disability. In Texas Workers' Compensation Commission Appeal No. 012402 decided November 21, 2001, the Appeals Panel noted that an increase in the availability of a claimant for the concurrent employment may result in earnings which are considered postinjury earnings. In this case, there is very little to prove the AWW and absolutely nothing to indicate the concurrent self-employment income, if any, during the weeks at issue (_____, through March 31, 2002). Since no preinjury or postinjury earnings were offered we are unable to determine whether there was disability and the effect of the postinjury earnings from the concurrent employment compared to the preinjury concurrent employment. We reverse the hearing officer's decision that the claimant had disability from _____, through March 31, 2002, and remand the case for the development of the record regarding the specific period of disability at issue and preinjury and postinjury earnings from the concurrent employment.

The true corporate name of the insurance carrier is **UNIVERSAL UNDERWRITERS, a division of ZURICH NORTH AMERICA,** and the name and address of its registered agent for service of process is

GARY SUDOL
ZURICH NORTH AMERICA
12222 MERIT DRIVE
DALLAS, TEXAS 75251.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Roy L. Warren
Appeals Judge